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IN THE

Supreme Court of the United States

October Term, 1994

CAPITOL SQUARE REVIEW AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SHELLENBARGER, and OHIO SENATOR RICHARD T. FINAN,

Petitioners,

v.

VINCENT J. PINETTE, DONNIE A. CARR, and KNIGHTS OF THE KU KLUX KLAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS AND THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE *AMICI*

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, religious and economic rights of Jews. It has filed numerous briefs *amicus curiae* in cases involving the Establishment Clause. In recent years it has had numerous occasions to address the relationship between the Establishment Clause and the public forum doctrine, the very issue presented here.

* * *

The National Jewish Community Relations Advisory Council (NJCRAC) is an umbrella organization including the following national member organizations: American Jewish Committee, American Jewish Congress, Anti-Defamation League, B'nai B'rith, Hadassah, Jewish War Veterans of the United States of America, Jewish Labor Committee, National Council of Jewish Women, Union of

American Hebrew Congregations, United Synagogue of Conservative Judaism, Women's League for Conservative Judaism, Women's American ORT; as well as 117 community member agencies representing all major Jewish communities in the United States.

As the national planning and coordinating body for the field of Jewish community relations, dedicated to preserving the principles embodied in the Bill of Rights, NJCRAC believes that the separation of church and state is an essential bulwark in maintaining the individual, group, and political equality of all Americans. (The Union of Orthodox Jewish Congregations of America, a NJCRAC member agency, does not join in this brief because it has not taken a position on the issues raised by this case).

The brief is filed with the consent of the parties.

STATEMENT OF THE CASE AND FACTS

The *amicus* adopts the statements of the case and the facts of the Petitioner.

ARGUMENT

The Petition for Certiorari adequately demonstrates that a full-fledged conflict exists between the Second[1] and Fourth Circuits,[2] on the one hand, and the Sixth[3] and Eleventh Circuits[4] on the other, whether free-standing, privately owned, religious symbols placed in public forums can in any circumstances be seen as reflecting state approval so as to unconstitutionally establish religion.

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1. *Kaplan v. City of Burlington*, 891 F.2d 1024 (2nd Cir. 1989).

2. *Smith v. Lindstrom*, 895 F.2d 953 (4th Cir. 1990).

3. *Americans United v. Grand Rapids*, 980 F.2d 1538 (6th Cir. 1993) (en banc).

4. *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993) (en banc).

The Sixth and Eleventh Circuits worry that to allow Establishment Clause concerns to justify exclusion of religious speech from a public forum is to allow the Establishment Clause to swallow up the Free Speech Clause. The Second Circuit, by contrast, fears that a blanket rule permitting free-standing religious symbols in all public forums allows the Free Speech Clause to swallow up the Establishment Clause.

The inter-circuit conflict turns in part on the question of whether reasonable persons would view a free-standing religious symbol in a public forum at the seat of government as representing the point-of-view of the state. But also lurking in this case is the question of whether equality of treatment of religious speech with secular speech should be the overriding theme in deciding these cases, or whether the Establishment Clause's prohibition of government support for religious speech requires that free-standing religious symbols be treated in some

circumstances as the state's speech. Cf. *Widmar v. Vincent*, 454 U.S. 263, 271 n.9 (1981)

The Second and Fourth Circuits hold that the principle of non-discrimination in a public forum and the demand of the Establishment Clause that government not be seen as endorsing religious speech are to be reconciled by weighing all of the facts and circumstances in a particular case to determine which constitutional policy is more directly implicated.

Those courts distinguish between a public forum at the seat of government and those located in public parks, reasoning that in the former, but not the latter, the reasonable observer could apprehend government endorsement of the religious message in the display of a free-standing symbol.[5] The *amicus* believes that this is

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5. Although Petitioners do not cite it, the Seventh Circuit seems to follow the Second and Fourth Circuit rule, thus compounding the conflict. Compare *AJCongress v. City of Chicago*, 827 F.2d 120 (continued...)

the only approach which gives due weight to both of the constitutional principles at stake.

The Eleventh Circuit, and the Sixth, reject this case-by-case approach and instead enforce a black-letter rule that private religious speech in a public forum cannot establish religion because it is in fact the speech of private parties not subject to the Establishment Clause. Although this view allows one constitutional provision to sweep away another, it does have the advantages (and disadvantages) of a black-letter rule.

As Petitioners point out, the importance of the issue – and its difficulty – is adequately demonstrated by the grant of certiorari in *Bd. of Trustees v. McCreary*, 53 U.S.L.W. 3273 (1984) and the resulting equally divided

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5.(...continued)

(7th Cir. 1987) with *Mather v. City of Mundelein*, 864 F.2d 1291 (7th Cir. 1989) and *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992) (en banc). Cf. *Kreisner v. City of San Diego*, 1 F.3d 775 (9th Cir. 1993)

Court. It is, as Petitioners again point out, further demonstrated by this Court's reservation of the issue in *County of Allegheny v. ACLU*, 492 U.S. 573, 600 n.50 (1989).

The conflict of circuits is not just theoretical. It has widespread practical implications. The annual experience of *amicus* in advising public officials and Jewish communities throughout the country at holiday time concerning free-standing religious symbols placed at the seat of government indicates widespread confusion as to the correct rule of law in this area. This is true not only in those circuits which have not decided the issue, but even within circuits which have come to some conclusion, because of continued uncertainty over which circuit's rule will ultimately prevail in this Court.

The relationship between religious speech in a public forum and whether the existence of such a forum is

inevitably sufficient to dispel any suggestion of state speech is not limited to free-standing religious symbols. The question of whether the existence of a designated public forum dispels all Establishment Clause concerns has arisen in the public school context as well. Thus, school districts have argued that if they designate graduation as a public forum (open only to one speaker chosen by students) a majority of students may choose to allow one of their number to offer a prayer without violating *Lee v. Weisman*, 112 S.Ct. 2649 (1992). See, e.g., *Adler v. Duval County School Bd.* 851 F.Supp. 446 (MD Fla. 1994).

Leaving aside the question of whether a public forum exists at high school graduation, the argument that the existence of a public forum mechanically defeats an Establishment Clause claim made in those cases is identical with the Respondent's claim here. A decision in

this case, then, would do much to bring order to the entire area of Establishment Clause and Free Speech law.

Nor are the dozens of annual disputes over free-standing displays (or supposed public forums in public schools) ordinary political disputes. When wholly religious symbols are displayed at the seat of government for purely religious reasons, they engender debates which are typically bitter and always divisive. They are frequently marred by charges and counter-charges of religious intolerance.

Some of this will linger even if this Court were to accept this case for review and determine the legal issues decisively. But the harm engendered by these legally open-ended disputes is compounded many-fold by the inability of local public officials to invoke a clear and unambiguous ruling of this Court. A decision by this Court in this case would have the welcome impact of minimizing disputes over free-standing religious symbols

at the seat of government, and of containing the harm to the social fabric caused by those disputes.

Moreover, as the facts of this case illustrate, religious symbols can be used for sending messages overlaid with heavy political significance. Citizens have the undoubted right to invest religious symbols with political meaning. It is, however, to blink reality to deny that such usage imposes great costs on the government which is made an unwilling host to such usages.

The display of a free-standing cross by the Ku Klux Klan at the Statehouse of Ohio surely is understood by Jews, Catholics and Blacks, and, perhaps, women, in ways far different from the antiseptic conclusion of the Sixth Circuit that only wielders of an "ignoramus' veto" [A-9], could object to a free standing Klan display on the Statehouse grounds.

The Klan has a sordid history in Ohio. J. Higham, Strangers In the Land: Patterns of American Nativism,

1860-1925 (1992 ed.) at 297-99. At times in Ohio's past, the Klan enjoyed at least the tacit approval of state government. For citizens of Ohio who are the traditional targets of Klan bigotry and violence – often celebrated with the burning of a cross such as the one the court below has ordered displayed at the Ohio Capitol – the cross' display means something far different than it did for judges of the Court of Appeals. Citizens understandably demand to know why public officials are allowing that symbol to appear once again on the grounds of the Capitol.

The Klan has the undoubted right to spread its poisonous ideology. Equally, the State of Ohio has at least the right, and perhaps the constitutional duty, to refrain from itself adopting those views. Where the Klan itself is clearly identified as the speaker, as when a live Klansman speaks on the Ohio Capitol grounds, the State may not act to silence the speaker because it disagrees

with his or her point of view. No one could reasonably confuse the State and the speaker.

The question presented by this case is whether a free-standing symbol at a seat of government is understood as purely private speech by reasonable bystanders, including those too far away to read the flimsy paper disclaimer tacked to the bottom of the cross [A-43], or whether, because it stands alone at the seat of government, where many citizens no doubt believe the State has unfettered discretion to decide what may be erected, it should, or at least, can, be treated for constitutional purposes as governmental speech.

If this Court decides that the Klan's right to speak encompasses the right to erect free-standing crosses at state Capitols, so be it. Citizens will learn that this is one of the heavier prices they pay for freedom. But because the issue is so important and so difficult this Court should decide it.

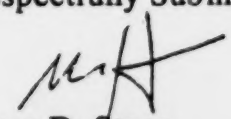
II

Paradoxically, the impact of the uncertainty of the law in this area will be to decrease the amount of speech on controversial topics. If government cannot know with certainty whether it will find itself unwilling host to free-standing symbols repugnant to its citizens because it maintains a public forum at the seat of government, then it would be well-advised to close the forum. The upshot would be that not only would free-standing symbols be excluded, but all speech would be silenced. Plainly, government has the power to do just that in any but the traditional public forum. *Perry Educ. Assoc. v. Perry Local Educator's Assoc.*, 460 U.S. 37 (1983). This Court should not encourage that development by dint of uncertain and conflicting results in lower court cases.

CONCLUSION

For the reasons stated, the Court should grant a writ of certiorari to review the judgment of the Sixth Circuit.

Respectfully Submitted



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